Florida House of Representatives

Interim Project

Substantive Review of Court Rules of Procedure
Comparison of Florida and Federal Court Rulemaking

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Introduction

Introduction

For the past two legislative sessions, legislation has been filed in both chambers directed at protecting public policy decisions of the Legislature, as reflected in statute, from being inappropriately altered by the court rulemaking process. The alteration of substantive rights through court rules of procedure violates the separation of powers provision of the Florida Constitution, and undermines the people's right to have matters of public policy determined by their representatives in the elected branches of government. Since the year 2000, the Court's rule authority has directly impacted the ability of the Legislature to set public policy on major issues such as death penalty postconviction claims, DNA testing, exempting mentally retarded persons from a death sentence for a capital crime, and providing lawyers to foster children to oppose certain actions of their guardians ad litem. Currently, the Florida Supreme Court is considering numerous proposed rule changes, including whether or not to authorize the expansion of the present right to counsel for juveniles charged with violating criminal laws beyond that held to be constitutionally required or statutorily authorized.[1]

The purpose of this project was to conduct a comprehensive review of the exercise of the Florida Supreme Court's rule authority in the alteration of substantive rights. This publication contains court rules of procedure which have been identified as inconsistent with statute or existing substantive constitutional boundaries in such a way as to create, expand, reduce or modify substantive rights provided by general law, or established by case precedent. This publication also contains an analytical comparison of Florida's court rulemaking process to the federal court rulemaking process.

Methodology: For purposes of this review each court rule was analyzed by staff utilizing an analytical framework designed to test each rule for substantive content or effect. The framework's intended purpose was to facilitate an objective and uniform analytical review taking into account the various functions of each rule as well as the subtleties of distinguishing between procedural *implementation* of existing substantive law, and procedural *alteration* of substantive law. There were two versions of the analytical framework, developed for this review. One form was used when there was a corresponding statute for the rule reviewed, and another form was developed for when there was no corresponding statute. The annotated versions of these analytical rule review forms are attached as an appendix to this publication.

About this Report: This report is divided into two parts. Part I consists of the federal and state comparison of court rulemaking procedures. Part II contains the reviews of court rules of procedure divided into their respective subject areas.

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[1] See, Amendments to the Florida Rules of Juvenile Procedure, No. SC04-97, January 27, 2005 at p 13. "We thus decline to adopt *at this time* the portion of the rule . . . regarding consultation with an attorney prior to a waiver. We emphasize that we are not rejecting the proposed amendment to [the] rule . . ., but are merely deferring its consideration. *We intend to readdress the adoption of the amendment . . . at a future time following the conclusion of the legislative session.*" (emphasis added).

Only those rules which were found to be inconsistent with existing substantive law were included. In addition, in those circumstances where the rules of an entire subject area were not found to contain any substantive alteration, the reviewing staff completed a "Rule Review Completion" to document to completion of the review in that specific subject area.

Part I

Comparison of Florida and Federal Court Rulemaking

Part I

Comparison of Florida and Federal Court Rulemaking

A Comparison of Florida and Federal Court Rulemaking

Court Rulemaking in Florida

Unlike the federal constitution, the Florida Constitution includes a specific provision pertaining to the separation of powers among the three braches of government. Article II, Section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Article V, Section 2(a) of the Florida Constitution provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts," although "[r]ules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature." However, any rule repealed by the Legislature may be reenacted by the Court.[2]

The Florida Rules of Judicial Administration set forth the process by which the Supreme Court adopts or amends a rule of procedure. The Florida Bar has standing committees that review and recommend rules to the Court. The executive office of the Florida Bar makes appointments to the committees after soliciting applicants from the bar membership.[3] Committees currently exist in the following areas: civil procedure; criminal procedure; small claims; traffic court; appellate court; juvenile court; evidence; judicial administration; probate; workers' compensation and family law.

The Court ultimately decides whether to adopt or amend a rule. A rule change can be initiated by the Supreme Court or by any person who files a proposal with the Supreme Court. The Supreme Court refers a proposal to the appropriate bar committee. A committee can accept, amend or reject proposed amendments. The committees can also originate proposals and "are charged with the duty of regular review and reevaluation of the rules to advance orderly and inexpensive procedures in the administration of justice."[4] Each bar committee submits all recommended rule changes to the Board of Governors of the Florida Bar based on a schedule established by the Court.

The Board of Governors considers and votes on each recommendation of the bar committees. The bar committee then files a report with the Supreme Court that includes a list of proposed changes as well as the voting record of the committee and the Board of Governors. The Committee Report must contain any dissenting views[5] of the Committee

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[2] For examples of Legislatively repealed rules reenacted by the Court, see *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) and *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).
[3] Fla. R. Jud. Admin. 2.130(b)(4).
[4] Fla. R. Jud. Admin. 2.130(b)(6).
[5] Fla. R. Jud. Admin. 2.130(c)(4)(E).

on the proposal and a minority Committee Report may be filed by dissenters if desired.[6] Committee reports are published on the internet site of the Florida Bar and in the Florida Bar news.

After giving public notice of the proposals and soliciting comments, the Court conducts oral argument if requested by interested parties or deemed necessary by the Court.[7] Public notice is given on the websites of the Supreme Court and the Florida Bar, as well as in the Florida Bar News. The Court decides whether to adopt, reject or modify the proposal and issues an opinion which sets forth its decision. Additionally, the Court has the authority to establish a rule of procedure without prior input from the public or any bar committee if it finds that an emergency exists.[8]

Essentially, the courts have held that substantive provisions are within the authority of the Legislature and that procedural provisions are within the "exclusive authority"[9] of the courts. In practice, determining the difference is not readily apparent. In 1973, Justice Adkins described the difference between substance and procedure in this way:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[10]

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[6] Fla. R. Jud. Admin. 2.130(d).

[7] Fla. R. Jud. Admin. 2.130(c)(5). Notice of the hearing is provided on the internet websites of the Supreme Court and the Florida Bar and in the Florida Bar news, as well as, to the relevant committee, the Florida Bar, the Judicial Management Council, each district court of appeal, each judicial circuit, and any person that has asked in writing to be notified.

[8] Fla. R. Jud. Admin. 2.130(a).

[9] *Allen v. Butterworth*, 756 So.2d 52, 59 (Fla. 2000). See also, *Johnson v. State*, 336 So.2d 93, 95 (Fla. 1976), where the Florida Supreme Court held that a statute related to the destruction of judicial records was "an unconstitutional encroachment by the legislative branch on the procedural responsibilities granted exclusively to this Court." See also, *Markert v. Johnston*, 367 So.2d 1003, 1006 (Fla. 1978), finding that "the timing of joinder during the course of a trial is, without question, a matter of practice or procedure assigned by the Constitution exclusively to this Court."

[10] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

Florida courts have held invalid statutes that conflict with court rules. For example, in 1976, the Florida Supreme Court ruled unconstitutional a statute regarding a state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.[11] In 1991, the Court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaim was unconstitutional because it conflicted with an existing rule of civil procedure.[12]

However, some infringement on the part of the Legislature has been allowed by the courts into the area of practice and procedure where a "statute creates substantive rights and any procedural provisions are directly related to the definition of those rights..."[13] In holding that a statute permitting a mortgagee to foreclose its mortgage without posting a bond did not infringe on the Court's rulemaking authority, the Court stated:

> Therefore, we are of the view that section 702.10(2) creates substantive rights and any procedural provisions contained therein are intimately related to the definition of those substantive rights. We have consistently rejected constitutional challenges where the procedural provisions are intertwined with substantive rights. *See* Smith v. Department of Ins., 507 So.2d 1080, 1092 n. 10 (Fla. 1987) (finding that when procedural sections are directly related to the substantive statutory scheme then those provisions do not violate the Separation of Powers Clause of the Florida Constitution).[14]

Federal Court Rulemaking

United States Constitution

Article III, Section 1 of the Constitution of the United States provides, in pertinent part, that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Unlike the Florida Constitution, the federal constitution does not create any lower courts. Thus, federal courts other than the Supreme Court are entirely creatures of federal statute. Moreover, unlike the specific grant of rulemaking authority to the Florida Supreme Court in Article V, Section 2(a) of the Florida Constitution, the federal constitution does not mention rules of practice and procedure. Taking these two premises together, therefore,

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[11] *See In re Connors*, 332 So.2d 336 (Fla. 1976).

[12] *See Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991).

[13] *Caple v. Tuttle's Design-Build, Inc.*, 753 So.2d 49, 55 (Fla. 2000). *See also Kalway v. State*, 730 So.2d 861, (Fla. 1st DCA 1999) which held that the "procedural aspects of the law under examination in this case are minimal and do not void the statute, because they are intended to implement the substantive provisions of the law... If the procedural elements of the statute were found to intrude impermissibly upon the procedural practice of the courts, the legislative provisions would have to give way to the court rules and procedures."

[14] *Id.* at 54. The *Caple* Court further cited *VanBibber v. Hartford Accident & Indem. Ins. Co.*, 439 So.2d 880, 883 (Fla. 1983), which held "that statute that prohibited joinder of insurers was within the Legislature's power to regulate insurance industry, though it affected joinder of parties in courts."

> [c]ongressional authority to regulate the lower federal courts' practice, procedure, and administration, derives from [Congress']s power to constitute (or not to constitute) the federal courts, which, when taken in combination with the 'necessary and proper' clause, is thought to include the power to regulate the operations of whatever lower courts Congress sees fit to create.[15]

A corollary to this is that the federal courts, including the Supreme Court, do not have inherent authority to promulgate rules of practice. Indeed, throughout the eighteenth and nineteenth centuries, and into the twentieth, federal courts usually simply applied the procedural rules of the states in which they sat.[16] The authority to regulate practice and procedure before the federal courts rests ultimately with Congress.[17]

Rules Enabling Act

In 1934, Congress passed the Rules Enabling Act ("the Act"),[18] authorizing the Supreme Court to promulgate uniform rules of practice and procedure for all federal courts. Although significantly amended in 1948, 1973, 1988 and 1990, the basic principle of qualified delegation underlying the Act remains the same: the judicial branch develops and proposes rules, but Congress retains the final say on whether and in what form they are adopted.

Another constant feature of the Act throughout its history is that the Supreme Court cannot propose rules on its own initiative, but only upon the recommendation of the Judicial Conference of the United States, a body established to "carry on a continuous study of the operation and effect of the general rules of practice and procedure,"[19] chaired by the Chief Justice of the United States and under current law consisting of the Chief Judges of each of the 13 federal appellate circuits, the Chief Judge of the Court of International Trade, and a district (trial) judge from each circuit chosen by the circuit and district judges of their circuit.[20] The Judicial Conference is also empowered by Congress to adopt rules actually governing the rulemaking process.[21]

The Director of the Administrative Office of the U.S. Courts describes how the Judicial Conference conducts its work in the rulemaking process:

> The Judicial Conference's responsibilities as to rules are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the

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[15] American Bar Association, "The History and Evolution of Judicial Independence" in *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence* (1997), available online at http://www.abanet.org/govaffairs/judiciary/rhistory.html.
[16] *See* PETER FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 13-14 (1973).
[17] *See Hanna v. Plumer*, 380 U.S. 460 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).
[18] Pub. L. No. 73-415, 48 Stat. 1064. The current version of the Rules Enabling Act, as subsequently amended, is codified as 28 U.S.C. §§ 2071-2077.
[19] 28 U.S.C. § 331.
[20] *See id.* (establishing the Judicial Conference) and 28 U.S.C. § 2074 (providing the Judicial Conference's role in the rulemaking process and empowering to establish committees to advise it).
[21] *See* 28 U.S.C. § 2073(a)(1).

"Standing Committee." 28 U.S.C. § 2073(b). The Judicial Conference has authorized the appointment of five advisory committees to assist the Standing Committee, dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules. 28 U.S.C. § 2073(a)(2). The Standing Committee reviews and coordinates the recommendations of the five advisory committees, and it recommends to the Judicial Conference proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interests of justice." 28 U.S.C. § 2073(b).

The Standing Committee and the advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a reporter, a prominent law professor, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes.[22]

In practice, interested parties submit proposals for rules changes to the advisory committees which, if approved, are transmitted to the Standing Committee, from there to the full Judicial Conference, from there to the Supreme Court, and from there to Congress, with the possibility of amendment or rejection at each stage in the process.

Members of the committees are appointed by the Chief Justice. There are no qualifications for the members of the committees set out in law. A list of the current committees and their membership is attached to this memorandum.

The Administrative Office of the U.S. Courts summarizes the process:[23]

SUMMARY OF FEDERAL COURT RULEMAKING

	Action	Date
STEP 1		
•	Suggestion for a change in the rules. *(Submitted in writing to the secretary of the Standing Committee.)*	At any time.
•	Referred by the secretary to the appropriate advisory committee.	Promptly after receipt.
•	Considered by the advisory committee.	Normally at the next committee meeting.
•	If approved, the advisory committee seeks authority from the Standing Committee to circulate to bench and bar for comment.	Normally at the same meeting or the next committee meeting.

[22] Leonidas Ralph Meacham, "The Rulemaking Process: A Summary for Bench and Bar," as updated September 9, 2003, available online at http://www.uscourts.gov/rules/proceduresum.htm.
[23] *Id.*

STEP 2	
• Public comment period.	6 months.
• Public hearings.	During the public comment period.
STEP 3	
• Advisory committee considers the amendment afresh in light of public comments and testimony at the hearings.	About one or two months after the close of the comment period.
• Advisory committee approves amendment in final form and transmits it to the Standing Committee.	About one or two months after the close of the comment period.
STEP 4	
• Standing Committee approves amendment, with or without revisions, and recommends approval by the Judicial Conference.	Normally at its June meeting.
STEP 5	
• Judicial Conference approves amendment and transmits it to the Supreme Court.	Normally at its September session.
STEP 6	
• The Supreme Court prescribes the amendment.	By May 1.
STEP 7	
• Congress has statutory time period in which to enact legislation to reject, modify, or defer the amendment.	By December 1.
• Absent Congressional action, the amendment becomes law.	December 1.

Although codified in a separate section of the United States Code, the process for adopting rules to govern practice in the federal bankruptcy courts is essentially identical.[24]

Under the Act's original terms, Congress had only a three-month window in which to act on rules prescribed by the Court before they would automatically become law; since 1988, this has been extended to seven months.[25] Moreover, the amendments to the Act passed in that year also require positive approval by Congress of any proposed rule that would affect evidentiary privileges.[26]

The Act also provides for the adoption of local rules at both the circuit (appellate) and district (trial) levels, and for adoption of the Supreme Court's own internal rules.[27] While such rules do not pass through the same process with all its stages as the general rules,

[24] *See* 28 U.S.C. § 2075.
[25] *See* Pub. L. 100-702, 102 Stat. 4642; 28 U.S.C. § 2074(a).
[26] *See* 28 U.S.C. § 2074(b).
[27] *See* 28 U.S.C. § 2071.

they are subordinate to the general rules,[28] and their adoption must still provide a period for public notice, hearing and comment.[29] Circuit local rules may be repealed or modified by the Judicial Conference without requiring approval from the Supreme Court; district local rules may likewise be repealed or modified by the Judicial Council (a local equivalent to the Judicial Conference) of the individual circuit in which the district in question is located.[30]

Jury Instructions

The federal courts have not adopted jury instructions as rules. Most of the federal appellate circuits have published "pattern" or "model" jury instructions, but these are only guidelines without any force of law. The Second, Third, Fourth, Tenth, District of Columbia and Federal circuits do not appear to have done so. Moreover, the Federal Judicial Center (FJC) also publishes pattern jury instructions; the FJC is a statutorily independent agency within the judicial branch but separate from the Administrative Office of the U.S. Courts.[31] Since final authority over practice and procedure in the federal courts rests with Congress, jury instructions could be adopted by statute as well as through the Rules Enabling Act process, although neither has been done.

In Florida, standard jury instructions are adopted by order of the Florida Supreme Court based on recommendations made by Florida's Committee on Standard Jury Instructions. The development of standardized jury instructions is a function of the Court's rulemaking authority. The form of standard jury instructions in criminal cases is expressly provided by rule.[32] Unlike the federal system, however, where Congress has the authority to amend jury instructions, the Florida Legislature cannot amend standard jury instructions where the instruction is inconsistent with the statute or contains additional elements not required by the Legislature.[33]

There is a separate committee for criminal jury instructions and one for civil jury instructions. These committees follow the same process as the rules committees discussed above in presenting their recommendations to the Court.

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[28] *See* 28 U.S.C. § 2071(a).
[29] *See* 28 U.S.C. § 2071(b).
[30] *See* 28 U.S.C. § 2071(c).
[31] *See* 28 U.S.C. § 620. More information about the FJC is available at its website, http://www.fjc.gov.
[32] Fla. R. Crim. P. 3.985
[33] *See* Interim Project on Standard Jury Instructions in Criminal Cases, January 2004.

Part II

Rule Review

Part II

Rule Review

Criminal Procedure

Criminal Procedure

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.172(c)8		Original rule adopted in 1977.	Amendment added in 1988.

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes.
2. What new right is created?	The rule creates a right for a defendant to be informed that if he or she is not a United States citizen and pleads guilty or nolo contendere, the plea may subject him or her to deportation.
3. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	In 1987, the Florida Supreme Court held that a defendant was not entitled to collaterally attack his guilty plea based on a claim that his counsel was ineffective for failing to advise him that the guilty plea could subject the defendant to deportation. State v. Ginebra, 511 So.2d 960 (Fla. 1987). The court held that "for counsel to provide reasonably effective assistance mandated by the Constitution, he need advise his client of only the direct consequences of a guilty plea." The court also held that deportation is not a direct consequence of a guilty plea. The court noted that the vast majority of federal courts have held that "failure to advise a client that deportation may follow from a guilty plea does not constitute ineffective assistance of counsel and thus form the basis for withdrawing the plea." In 1988, the Florida Supreme Court amended rule 3.172 to require courts, before accepting a plea, to inform defendants of the possibility of deportation proceedings. The majority opinion adopting the rule provided no rationale for

	the rule. Justice Overton and Justice McDonald dissented from the rule amendment and stated the following: "There is no constitutional right to such notification and the rule overrules our decision in Ginebra. All the effects of a plea can never be fully covered by the court, and that is one of the primary reasons we require a defendant to have counsel. This new rule establishes a new procedural due process right, and trial judges should understand that the failure to so notify noncitizens of the possibility of deportation may result in successful postconviction relief challenges to their pleas. I see no need to add this requirement to our rules." Three justices concurred in an opinion stating the following: "Contrary to the view of Justice Overton, I do not construe the amendment to rule 3.172(c)(viii) as affecting our decision in [Ginebra] or creating a new constitutional right. The amendment simply represents a policy decision that in a state where so many non-U.S. citizens reside, it is desirable henceforth to advise defendants that deportation may be one of the consequences of their guilty pleas." The Supreme Court subsequently held that the rule superseded the holding in Ginebra to the extent of any inconsistency. *State v. De* Abreu, 613 So.2d 453 (Fla. 1993). Upon a showing of prejudice, courts now allow a defendant to withdraw a plea if he or she was not informed that the plea could result in deportation. *See e.g. Peart v.* State, 756 So.2d 42 (Fla. 2000) Labady *v. State*, 783 So.2d 275 (Fla. 3rd DCA 2001)(ordering trial court to vacate defendant's plea where trial judge asked defendant if he was aware that plea may have "adverse consequences" but did not

	specifically refer to "deportation" possibility; holding that judge must specifically advise defendant that he or she may face deportation as consequence of plea). The Florida Supreme Court has stated that the amendment to rule 3.172 did not invalidate the reasoning in *Ginebra* –that a defendant does not need to be informed of the collateral consequences of his or her plea in order to render the plea voluntary. *Major v. State, 814 So.2d 424 (Fla. 2002); State v. Partlow,* 840 So.2d 1040 (Fla. 2003)(holding that sexual offender registration is a collateral consequence of plea and therefore failure to inform that defendant of requirement does not render plea involuntary).
4. Was the rule created or amended in response to a court decision construing a substantive right?	The rule was amended to grant a right for a defendant to be told that he or she could be deported as a result of a plea a year after the court held that this was not constitutionally required. The court did not provide any explanation for the rule change
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.203		2004	Has not been amended since became effective.

Corresponding Statute Number: s. 921.137, F.S.

1. Is the rule inconsistent with the statute?	Yes.
2. How?	In 2001, the legislature created section 921.137, F.S. that prohibited the imposition of a death sentence upon a mentally retarded defendant. Specifically, the section provides that a sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined, in accordance with the section, that the defendant has mental retardation. After a defendant is convicted of a capital felony and the jury has recommended a sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. If the court finds by clear and convincing evidence that the defendant has mental retardation, the court may not impose a sentence of death and must enter a written order that sets forth the findings in support of the determination. After this law was enacted, the United States Supreme Court ruled that the execution of a mentally retarded criminal is prohibited by the Eighth Amendment of the United States Constitution which bars cruel and unusual punishment. Atkins v. Virginia, 122 S.Ct. 2242 (2002). The court left it up to the individual states to establish their own methods of determining whether an offender has mental retardation. In 2003, the Criminal Procedure Rules Committee of the Florida Bar proposed a new rule of criminal procedure to the Florida Supreme Court to implement section 921.137, F.S. The Criminal Court Steering Committee submitted proposed

	alternative rules. These proposed rules differed from the statute adopted by the legislature in two primary respects. First, the statute requires that the court find by *clear and convincing evidence* that the defendant has mental retardation. The proposed rule did not reference the necessary burden of proof. Second, the statute required that the hearing on whether a defendant was mentally retarded take place after the defendant is found guilty and the jury has recommended a sentence of death. The proposed rule required that the hearing be conducted before the trial commenced. Several members of the House of Representatives [Representatives Kottkamp, Barreiro, and Kyle] filed comments in the case in opposition to the conflicting parts of the proposed rule and asserted that the legislature and not the court has the authority to set policy. The Attorney General's office filed comments that objected to aspects of the proposed rule and specifically objected on several grounds to the rule's requirement that the hearing be held pre-trial. The brief stated that "[t]here is neither authority nor justification for the Court to substitute its judgment for the clearly-expressed intent of the legislature regarding this substantive right." In May of 2004, the Florida Supreme Court adopted the Rule of Criminal Procedure 3.203 that contains the provisions which are in conflict with the statute passed by the legislature. The opinion acknowledged that under the Atkins decision "individual states are free to establish their own methods for determining which offenders are mentally retarded". Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So.2d 563 (FLa. 2004) The majority

	opinion of the court did not suggest that the statute was constitutionally infirm or give any reasons for adopting a rule which is in conflict with the statute. A concurring opinion indicated that the provision "allowing the determination to be made before trial promotes the most efficient use of increasingly scarce judicial and legal resources."
3. Has the statute been held unconstitutional? (by any district court of appeal, the Florida Supreme Court or any federal court?)	No.
4. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	Yes, in Atkins v. Virginia, the United States Supreme Court left it to individual states to establish methods for determining whether an offender has mental retardation. Fundamentally, Atkins barred the *execution* of mentally retarded persons convicted of capital crimes the rule however, bars the *prosecution* of a mentally retarded person for a "capital" crime when one takes into account the fact that at the time of the trial the maximum possible sentence is life imprisonment.
5. Was the rule created or amended in response to a court decision construing a substantive right?	The rule was proposed based on the statute prohibiting the execution of a mentally retarded defendant and the case of Atkins v. Virginia, but substantive expansion of the rule over the statute were not necessitated by U.S. Supreme Court decision. The Florida Supreme Court has not held the statute unconstitutional or contrary to Adkins in any respect.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	The rule provides a much broader protection than constitutionally required or statutorily authorized for the reasons described in response to question 4.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	The rule gives a defendant the right to have a court determine whether he or she is mentally retarded before the trial commences. This has at least three substantive implications: First, due process scrutiny is lower when it is applied to

	persons after they have been convicted of a crime. One substantive effect of the rule therefore is to raise the level of due process scrutiny and protection for mental retardation hearings. Before trial, more legal restrictions can be tied to what information may be available for consideration in determining the truthfulness of a defendant's claim of mental retardation. Second, the state cannot appeal an adverse decision relating to mental retardation unless it is willing to postpone commencement of the trial. Third, it deprives the state of the exercise of free prosecutorial discretion in deciding whom to try for a capital crime before a death qualified jury, and in seeking a conviction of a capital crime before determining the issue of mental retardation for purposes of excluding a convicted defendant from a potential, or jury recommended, death sentence. The rule does not set forth the burden of proof necessary to establish that the defendant is mentally retarded. The issue of the proper burden of proof may become more complex by advancing the proceeding pretrial due to higher due process standards.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.215(c)(2)		1980	Provision in question has not been amended since 1980. [Formerly rule 3.214(c)(2)]

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes.
2. What new right is created?	In cases in which a defendant proceeds to trial with the aid of psychotropic medication, on the motion of defense counsel, the jury must be instructed regarding the defendant's use of the medication. There is a corresponding standard jury instruction which provides the following: (Defendant) currently is being administered psychotropic medication under medical supervision for a mental or emotional condition. Psychotropic medication is any drug or compound affecting the mind or behavior, intellectual functions, perception, moods, or emotion and includes anti-psychotic, anti-depressant, anti-manic, and anti-anxiety drugs. Florida Standard Jury Instruction 3.09(b). Section 916.12(5), F.S. provides a "defendant who, because of psychotropic medication, is able to understand the nature of proceedings and assist in the defendant's own defense shall not automatically be deemed incompetent to proceed simply because the defendant's satisfactory mental functioning is dependent upon such

	medication." This language is contained in rule 3.215(c). However, the statute does not indicate that that the jury must be instructed on the use of such medication. In Rosales v. State 547 So.2d 221 (Fla. 3rd DCA 1989) the court reversed a murder conviction based on the fact that the judge had not instructed the jury that the defendant's attendance at trial is aided by medication for a mental condition in accordance with the rule of procedure. In Alston v. State, 723 So.2d 148, 158 (Fla.1998), the Florida Supreme Court distinguished the Rosales case in affirming a death sentence despite the fact the judge had refused to grant the defendant's request that the jury be instructed of the defendant's use of psychotropic medication. The court stated: "The plain language of this rule requires an instruction on psychotropic medication only when the defendant's ability to proceed to trial is because of such medication. Appellant's motion requesting the medication instruction did not allege that appellant was able to proceed to trial because of the psychotropic medication. Nor was there any such evidence before the court in the competency proceeding. The motion simply asserted that appellant was on psychotropic medication. This assertion alone was insufficient to require an instruction on psychotropic medication. Accordingly, under these circumstances, we find no error in the refusal to give the requested instruction." Id. at 158. The court has not given an explanation of the origin or necessity for an instruction on psychotropic medication in any reported decision.
3. Does the rule expand rights beyond what has been required by court decisions?	Yes. Prior to adoption of the rule, the court had not held that the jury had to be

(excluding court orders adopting rules)	instructed on the defendant's use of psychotropic medication.
4. Was the rule created or amended in response to a court decision construing a substantive right?	No.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.216(e) & (f)		1980	Provision discussed below added to rule in 1996 and not amended since then.

Corresponding Statute Number: s. 775.027, F.S.

1. Is the rule inconsistent with the statute?	Yes
2. How?	In 2000, the Legislature adopted section 775.027, F.S. which provides that insanity is an affirmative defense to a criminal prosecution. The section defines the term insanity and provides that "mental infirmity, disease, or defect does not constitute a defense of insanity except as provided" in the statute. Rule 3.216(f) requires a judge to appoint an expert if a defendant files a notice to rely on any mental health defense *other than insanity*. This appears to contemplate that there are valid mental health defenses to a criminal charge other than insanity.
3. Has the statute been held unconstitutional? (by any district court of appeal, the Florida Supreme Court or any federal court?)	No. There is no reported case law citing or applying section 775.027, F.S.
4. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	Yes.
5. Was the rule created or amended in response to a court decision construing a substantive right?	Yes. According to the committee notes, the provision in question was added to conform to State v. Hixson, 630 So.2d 172 (Fla. 1993), a Florida Supreme Court case allowing for the introduction of evidence of battered-spouse syndrome.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	Yes, in the sense that there is created a requirement for a court to appoint an expert to support a mental health defense other than insanity.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	Rule appears to contemplate that a defendant can rely on mental health defense other than insanity.

8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.220		1968	2004

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes.
2. What new right is created?	The rule gives the state and defense counsel the right to pre-trial "discovery" in criminal cases. When a defendant gives notice of intent to participate in discovery, the state is obligated to disclose to the defendant a list of witnesses, statements of the defendant and certain other evidence. The defendant has the obligation to disclose certain items to the state. [Note that while there is no Florida statute creating any rights to discovery, there are several statutes that reference the discovery rule. see e.g. ss. 119.07, 316.193, 903.047, 914.06].
3. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	Yes. The United States Supreme Court has stated that "there is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977).; Bartlett v. Hamwi, 626 So.2d 1040, 1042 (Fla. 4th DCA 1993)(noting that although the prosecution has a duty under the due process clause to disclose evidence favorable to the defendant upon request, often referred to as "exculpatory evidence", as required in the case of *Brady v. Maryland,* 373 U.S. 83 (1963), there is not constitutional right to discovery); R. v. State, 476 So.2d 218, 219 (Fla.3rd DCA 1985)(noting that discovery process is created "only be rule and is not mandated by the constitution); State v. Ross, 792 So.2d 699, 701(Fla.5th DCA 2001)(stating that

	"[a]lthough there is no constitutional right to discovery in a criminal case criminal defendants do have a right to pretrial discovery under Florida Rule of Criminal Procedure 3.220(b).")(citations omitted); Cuciak v. State, 410 So.2d 916, 919(Fla. 1982) (concurrence) ("Likewise, under the Florida Constitution, there is no general constitutional right of discovery in criminal cases. Prior to the adoption of the discovery rule for criminal cases in Florida, the doctrine of discovery was "a complete and utter stranger to criminal proceedings.'"); State v. Miller, 672 So.2d 855, 856(Fla. 5th DCA 1996)(noting that before the enactment of discovery rules it was "the norm" for a defendant to go to trial without discovery);. Scott v. State, 657 So.2d 1129, 1133 -1134 (Fla. 1995)(dissenting)(noting that under broad discover rules, defendant has ability to discover much more than would have been available in most other jurisdictions, including the federal courts) An example of the difference between the pretrial discovery process in Florida and in other jurisdictions can be seen in the use of depositions which are provided for in rule 3.220(h). Without obtaining permission of the court, a defendant is authorized to take the deposition of any victim or witness listed by the prosecution who fall within a broad range of individuals who could be used to testify at trial, plus anyone else who *may* have information relevant to the offense charged even if they are *not* listed by the prosecution. See (h)(1)(A). The fact that a victim or witness, including a law enforcement officer, has provided a sworn affidavit or provided an oral recorded statement, or provided full investigative report does not negate the "right" of the defendant to depose any witness. The most common purpose for taking depositions in cases where a statement or affidavit has already been provided is to allow the

	defendant to attack the creditability of the victim or witness through the use inconsistent or seemingly inconsistent statements obtained during the deposition. The deposition can be conducted the defense lawyer representing the defendant or even by the defendant himself if he is unrepresented by a lawyer. A deposition cannot be taken in a misdemeanor or traffic case unless good cause is shown. In determining whether good cause exists, the court must consider: 1) the consequences to the defendant; 2) the complexity of the issues involved; 3) the complexity of the witness testimony and; 4) other opportunities available to the defendant to discover the information sought by deposition. The purpose of depositions is different in federal cases than in Florida cases. In Florida, rule 3.220 refers to "discovery depositions". In contrast, a federal court noted that "[d]epositions generally are disfavored in criminal cases. Their 'only authorized purpose is to preserve evidence, not to afford discovery.'" U.S. v. Drogoul, 1 F.3d 1546 (11th Cir. 1993)(citations omitted). Rule 15 of the Federal Rules of Criminal Procedure provides that a deposition can only be taken when "due to the exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for trial". Federal case law provides that the court must consider whether: 1) the witness will be unavailable at the time of trial; 2) injustice would result without the material testimony the deposition could provide and 3) countervailing factors which would make the deposition unjust to the nonmoving party. U.S. v. Thomas, 62 F.3d 1332 (11th Cir. 1995); Drogol, 1 F.3d 1546 (11th Cir. 1993) (noting that "[w]hen a prospective witness is unlikely to appear at trial and his

	or her testimony is critical to the case, simple fairness requires permitting the moving party to preserve that testimony--by deposing the witness--absent significant countervailing factors which would render the taking of the deposition unjust.") Both the unavailability of the witness and the materiality of the testimony must be shown in order for the motion to depose to be granted.
4. Was the rule created or amended in response to a court decision construing a substantive right?	No.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	Yes. There is an indeterminate cost to the state in providing discovery.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.250		1968	Has not been substantively amended since implementation in 1968.

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes.
2. What new right is created?	Right of a defendant who offers no testimony other than his or her own to the first and last closing argument.
3. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	Yes. The Florida Supreme Court has characterized the effect of the rule as follows: [The rule is] clear and unambiguous--in a guilt phase proceeding, a defendant has the right to close in final argument only if the defendant presents no testimony other than his or her own.... Wike v. State, 648 So.2d 683, 686 (Fla.1994); Lamar v. State, 583 So.2d 771, 772 (Fla. 4th DCA 1991)("The final phrase of said rule gives the defendant in a criminal case the right to closing argument unless he offers witnesses other than himself. Stated differently, the defendant is entitled to close the argument if he offers no witnesses, or if he offers simply himself as a witness, but not if he offers someone other than or in addition to himself."). The Florida Supreme Court has explained the history of this rule as follows: To fully understand the rights this state has historically provided to defendants regarding concluding arguments under either rule, it is necessary to examine the history of these rules. At common law, the generally accepted rule was that the party

	who had the burden of proof had the right to begin and conclude the argument to the jury. The rule applied to both civil and criminal cases. The rationale behind this common law rule was to provide the party who shouldered the disadvantage of the burden of proof with the advantage of the opening and closing arguments before the jury. In 1853, this common law rule was changed in Florida to provide that a defendant who produced no testimony at trial was entitled to the advantage of making the concluding argument before the jury. That law was later codified as section 918.09, Florida Statutes. As early as 1858, this Court determined that a trial judge had no discretion in following the statutory predecessor of section 918.09 and that the erroneous denial of a defendant's right to concluding argument constituted reversible error. Throughout the years, Florida courts have never deviated from the holding that the denial of a defendant's right to close under this rule constitutes reversible error. In fact, this is true even though in 1968 section 918.09 was incorporated as rule 3.250 and in 1970 section 918.09 was repealed. Wike, 648 So.2d 683, 686 (Fla. 1995)(citations omitted) There are a large number of reported cases in which an appellate court reversed a felony conviction because the defendant was not given the opportunity to have the last closing argument. The Florida Supreme Court has determined that the right to make the closing argument where no evidence except the defendant's own testimony has been introduced, "is a vested procedural right, the denial of which constitutes reversible error." Birge v. State, 92 So.2d 819 (Fla. 1957); Freeman v. State, 846 So.2d 552, 554 -555 (Fla. 4th DCA

	2003)("This error is not subject to harmless error analysis."); Morales v. State, 609 So.2d 765, 766 (Fla 3rd DCA 1992)(reversing grand theft, burglary and resisting arrest convictions because "[i]n spite of the overwhelming evidence against [the defendant], the trial court did not scrupulously follow a required rule of procedure.") At least one court has urged a change in the Florida rule: Presently in the United States, forty-six states, the District of Columbia and all United States District Courts[34] allow the prosecution to close the final arguments in criminal cases. Florida is one of only four states that have a rule which provides the criminal defendant the right to close final arguments where the defendant presents no evidence other than his own testimony.....[W]e respectfully suggest that the time has come for our Supreme Court to revisit the wisdom of this provision. Diaz v. State, 747 So.2d 1021, 1025 (Fla. 3rd DCA 1999).
4. Was the rule created or amended in response to a court decision construing a substantive right?	No. The rule was created in 1968 based on section 918.09, F.S. Following the adoption of the rules, in 1970, the legislature repealed dozens of criminal statutes including section 918.09. See chapter 70-339.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

[34] See Federal Rule of Criminal Procedure 29.1 which states: "After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal."

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.280		1968	Provision discussed below has not been amended since 1968

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes.
2. What new right is created?	The rule provides that at the conclusion of the guilt phase of a trial, each alternate juror must be excused. Prior to the adoption of this rule, section 913.10(2), F.S. (1969) required that an alternate juror be discharged at the time the jury retires to consider its verdict. After the adoption of the rule in 1968, the statute was repealed. s. 70-339, Laws of Fla. Appellate courts have reversed criminal convictions in cases in which the trial judge has failed to dismiss the alternate juror as required by the rule. In the Fourth District Court of Appeal case of Berry v. State, an alternate juror was not "discharged by the trial court at the time the jury retired to consider its verdict, but was allowed to accompany the jury to the jury room during deliberations." In reversing the conviction, the appellate court stated: "Even though [the alternate juror] did not actually participate in the determination of the verdict, the possibility that she could have affected the jury verdict was apparent. The presence of [the alternate juror] in the jury room could have operated as a restraint upon the jurors and their freedom of expression. The attitudes of [the alternate juror] conveyed by facial expressions, gestures or the like may have had some effect upon the decision of one or more juror. The deliberations of the jury must be

	conducted in privacy and secrecy. Anything less infringes upon the defendant's constitutional right to trial by jury. The trial court committed fundamental error in allowing the alternate juror….. to accompany the jury to the jury room during deliberations. Accordingly, the judgment is reversed and the cause remanded for a new trial. Berry v. State, 298 So.2d 491, 493 (Fla.4th DCA 1974) The Fifth District Court of Appeal stated the following in the case of Bouey v. State: "Our system of justice is founded on the fundamental principle that disputes should be decided by a jury composed of citizens selected from the community where the dispute arises. The duty of the jurors is to resolve the contested issues fairly and impartially after thorough consideration of all of the evidence presented to them during the course of a trial. This can only be accomplished if they are provided a place of solitude and quiet, secured by the watchful eye of the trial judge. It is equally important that the deliberations of the jury be kept free from any influence from strangers to the proceedings who may inappropriately influence the jury or impart information to them that was not filtered through the rules of evidence under judicial supervision during the trial process. It is the concern that the alternate juror might unduly influence the outcome of the verdict that has prompted the courts to be so insistent that the alternate juror not be allowed in the presence of the primary jurors while they deliberate. Florida Rule of Criminal Procedure 3.280(a) specifically provides in pertinent part that "an alternate juror who does not replace a principal juror shall be discharged at the same time the jury retires to consider its verdict." This rule is mandatory, not

	permissive, and it requires discharge of the alternate juror when the principal jurors retire to deliberate. Thus, the alternate juror is considered a "stranger" to the deliberations." Bouey v. State, 762 So.2d 537, 539 (Fla. 5th DCA 2000)(citations omitted)(remanding case for determination of whether deliberations began in alternate juror's presence and stating "[i]f they did, a new trial is mandatory." In Sloan v. State, defense counsel specifically waived any objection to the fact that the alternate juror was present while the jury deliberated. On appeal, the appellant claimed that the case should be reversed. The court affirmed the conviction and stated: "Appellant's suggestion that the presence of the extra juror in the jury room was a defect of such constitutional dimension that it could not be waived pales in light of the fact that a defendant is only constitutionally guaranteed a trial by a jury of six persons." Sloan v. State, 438 So.2d 888, 890 (Fla. 2nd DCA 1983).
3. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	Yes, the Florida Supreme Court has not held than in the absence of the rule of procedure that reversal of a criminal conviction when a judge fails to properly dismiss an alternate juror would be constitutionally required.
4. Was the rule created or amended in response to a court decision construing a substantive right?	No.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.390		1972	Provision discussed below was amended in 1984.

Corresponding Statute Number: s. 918.10(1), F.S.

1. Is the rule inconsistent with the statute?	Yes
2. How?	Rule 3.390(a) states:"except in a capital case, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial." Section 918.10(1), F.S. states: At the conclusion of argument of counsel, the court shall charge the jury. The charge shall be only on the law of the case and *must include the penalty* for the offense for which the accused is being charged. "Prior to January 1, 1985, Rule 3.390(a) provided that upon the request of either the state or the defendant, the trial judge should 'include in said charge [to the jury] the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial.'" Legette v. State, 718 So.2d 878, 880 (Fla. 4th DCA 1998) The Florida Supreme Court changed the rule to prohibit a judge from instructing a jury on the possible sentence that may be imposed. The Florida Bar Re: Amendment to Rules-Criminal Procedure, 462 So.2d 386 (Fla.1984) Courts have characterized the rule as "abrogat[ing] the legislature's grant of discretion to the trial judge given in section." Knight v. State, 653 So.2d 457, 458 (Fla. 5th DCA 1995); affirmed by 668 So.2d 596 (Fla. 1996).

	The 5th District Court of Appeal explained the history of the rule as follows: "The rule was amended to its current form in 1984. However, the Criminal Procedure Rules Committee of The Florida Bar and the Conference of Circuit Judges of Florida originally requested the amendment two years earlier.. Because the supreme court did not deem the matter an emergency, it refused to amend the rule outside of the regular four-year cycle. Justice Alderman dissented, maintaining that the rule should be amended immediately: 'The resolution of the Executive Council of the Conference of Circuit Judges states cogent reasons for eliminating this portion of rule 3.390(a). It explains that the penalty is irrelevant to the jury's sole responsibility of determining a defendant's guilt or innocence, that the jury cannot be privy to the myriad factors which must be considered in sentencing, and that the court's advising the jury of the possible penalty is wholly inconsistent with the jury's responsibility to disregard the consequences of its verdict and tends to encourage a deplorable phenomenon which has come to be referred to as a "jury pardon." The deplorable phenomenon referred to by the Conference of Circuit Judges is the exercise by a jury of its power to return a verdict contrary to the evidence. In criminal cases, this abuse of power is irremediable because once the jury has wrongfully acquitted a defendant, its abuse of power may not be corrected on appeal. Just as there are individuals who disregard the law, there may also be juries that disregard the law. A jury that returns a verdict contrary to the evidence based on feelings of prejudice, bias, or sympathy is an "outlaw" jury, and its verdict will be a miscarriage of justice. Rule 3.390(a), as presently written, allows juries to be informed about matters that are irrelevant

	to its fact-finding job and which may encourage it to render a verdict contrary to the evidence.' From this history, there can be no doubt that the supreme court amended Rule 3.390, at least in part, to minimize the potential for jury sympathy based on the defendant's possible sentence." Limose v. State 656 So.2d 947, 949 (Fla. 5th DCA 1995)
3. Has the statute been held unconstitutional? (by any district court of appeal, the Florida Supreme Court or any federal court?)	No.
4. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	No. The rule prohibits a judge from informing the jury of the possible sentence that a defendant can receive. Since the rule was changed, appellate courts have consistently affirmed convictions where the appellant has claimed that the judge should have informed the jury of the possible sentence that he or she could have received.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	No. The rule eliminates a right that is provided for in statute and a prior version of the rule.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	No.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.710(a)		1972	Provision in question has not been substantively amended since 1972.

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes
2. What new right is created?	In cases in which a defendant was under the age of 18 years of age and cases in which the defendant is being sentenced for a first felony offense, the rule creates a right for a defendant to have the sentencing judge consider a presentence report prepared by the Department of Corrections. The trial court is prohibited from imposing a sentence other than probation without consideration of the presentence report. In re Florida Rules of Criminal Procedure, 272 So.2d 65, 122 (Fla. 1972) Appellate courts have interpreted this provision to require that a defendant be resentenced if the trial court did not consider a presentence report prior to sentencing a defendant. *Wilkerson v. State*, 583 So.2d 428, 428 -429(Fla. 1st DCA 1991)(remanding case for resentencing where report was not obtained or considered as required by rule; holding that defendant did not waive error by failing to object); Hardwick v. State, 630 So.2d 1212, 1215 (Fla. 5th DCA 1994). Sections 921.231 and 948.015, F.S. authorize a trial court to refer a case to the Department of Corrections for investigation prior to sentencing. These sections do not require the judge to consider the report before imposing a sentence and do not give

	the defendant a right to be resentenced if the judge does not consider the report.
3. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	The result of the court decisions cited above were reached as a result of the trial court's failure to follow the court rule. There is no constitutional guarantee of a defendant, or a statutory mandate, that a judge consider a presentence report completed by the Department of Corrections prior to imposing a sentence.
4. Was the rule created or amended in response to a court decision construing a substantive right.	No.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact.	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
3.710(b)		1972	Provision in question became part of rule in 2004.

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	The rule creates a right established in Florida Supreme Court case law.
2. What new right is created?	The right of a capital defendant to have a judge consider a presentence report in cases in which the defendant chooses not to present mitigation evidence.
3. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	Yes. Sections 921.231 and 948.015, F.S. authorize a trial court to refer a case to the Department of Corrections for investigation prior to sentencing. These sections do not require the judge to consider the report before imposing a sentence and do not give the defendant a right to be resentenced if the judge does not consider the report. In Muhammad v. State, 782 So.2d 343 (Fla. 2001), the Florida Supreme Court held that a trial court must order the completion of a presentence investigation (PSI) in a capital case where the defendant refuses to offer any mitigating evidence. The court described the rationale for the change in an earlier case as follows: "We have repeatedly emphasized the duty of the trial court to consider *all* mitigating evidence "contained anywhere in the record, to the extent it is believable and uncontroverted." This requirement "applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." In the past, we have

	encouraged trial courts to order the preparation of a PSI to determine the existence of mitigating circumstances "in at least those cases in which the defendant essentially is not challenging the imposition of the death penalty." Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. In 2004, the Florida Supreme Court amended rule 3.710 to require a judge to order a presentence investigation in a capital case in which a defendant chooses not to present mitigation evidence. Amendments to the Florida Rules of Criminal Procedure 886 So.2d 197, 199 (Fla.2004). The committee notes accompanying the rule change acknowledge that "[s]ection 948.015, Florida Statutes, is by its own terms inapplicable to those cases described in this new subdivision. Nonetheless, subdivision (b) requires a report that is 'comprehensive.'" The notes further state: "Accordingly, the report should include, if reasonably available, in addition to those matters specifically listed in *Muhammad v. State,* 782 So.2d 343, 363 (Fla.2001), a description of the status of all of the

	charges in the indictment as well as any other pending offenses; the defendant's medical history; and those matters listed in sections 948.015(3)-(8) and (13), Florida Statutes. The Department of Corrections should not recommend a sentence."
4. Was the rule created or amended in response to a court decision construing a substantive right?	Yes.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	There may be a fiscal impact to the Department of Corrections in conducting the presentence investigation.

Juvenile Procedure

Juvenile Procedure

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
8.060	None	1977	9/30/04

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes.
2. What new right is created?	**FRJP 8.060:** Provides the right to discovery to a child against whom a petition of delinquency has been filed.[35] If the child elects to participate in discovery, the petitioner must disclose within five days a witness list, specified statements, papers and objects, and other evidence.[36] Reciprocal discovery is required to be furnished by the child within five days after receipt of the petitioner's discovery exhibit.[37] Further, any party may take depositions after a petition of delinquency has been filed.[38] [39] **Florida Statute:** Chapter 985, F.S., does not specifically create a right to discovery in delinquency cases; however, 985.228(1), F.S., refers to discovery by requiring the adjudicatory hearing to be held as soon as practicable, ". . . and in accordance with the Florida Rules of Juvenile Procedure; but reasonable delay for the purpose of investigation, ***discovery***, or procuring counsel or witnesses shall be granted." (emphasis added).
3. Does the rule expand rights beyond	Yes. The United States Supreme Court has

[35] F.R.J.P 8.060(a)(1).
[36] F.R.J.P 8.060(a)(2).
[37] F.R.J.P 8.060(b).
[38] F.R.J.P. 8.060(d).
[39] **Note on dependency cases:** Section 39.507(2), F.S., provides for dependency cases that, "The parents or legal custodians shall be allowed to obtain discovery pursuant to the Florida Rules of Juvenile Procedure, provided such discovery does not violate the provisions of s. 39.202." Section 984.20(2), F.S., contains a similar provision regarding discovery and child in need of services cases. FRJP 8.245 governs the right to discovery in dependency cases.

what has been required by court decisions?	ruled that there is no constitutional right to discovery in a criminal case.[40] With specific regard to delinquency proceedings, a Florida appellate court has noted that juvenile discovery is created only by court rule and is not mandated by the Constitution.[41] As explained in the Rule Review Form for FRCP 3.220, the discovery rights created and implemented by the Florida Supreme Court have resulted in Florida criminal defendants and juvenile delinquents being afforded deposition authority considerably broader than that accorded by the federal government. This fact was criticized in a 1987 report entitled, "Discovering the Injustice: Criminal Depositions in Florida," by the Florida Department of Law Enforcement. The report indicated that Florida's deposition authority should be abolished as it results in the abuse of witnesses and in excessive costs in both dollars and labor.[42] In response to the report, the Legislature adopted a concurrent resolution recommending that the Florida Supreme Court create a commission to study discovery depositions.[43] The Supreme

[40] *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977).
[41] *R.R. v. State*, 476 So.2d 218, 219, fn. 4 (3rd DCA 1985).
[42] *Deposition Reform: Is the Cure Worse Than the Problem?*, 71-AUG Fla. B.J. 52 (July/August 1997).
[43] HCR 1679 (1988).
[44] *In re Amendment to Florida Rule of Criminal Procedure 3.220,* 550 So.2d 1097 (Fla. 1989).
[45] *In re Amendment to Florida Rule of Criminal Procedure,* 550 So.2d at 1098.
[46] *Id.*
[47] *Id.* at 1098-1099.
[48] *Deposition Reform: Is the Cure Worse Than the Problem?*, 71-AUG Fla. B.J. at 53.
[49] HB 675 (1995)(died in Committee on Criminal Justice); SB 626 (1995)(died in Committee on Judiciary).
[50] *Deposition Reform: Is the Cure Worse Than the Problem?*, 71-AUG Fla. B.J. at 53.
[51] *In re Amendment to Florida Rule of Criminal Procedure 3.220(h) & Florida Rule of Juvenile Procedure 8.060(d)*, 668 So.2d 951 (Fla. 1995).
[52] *Id.*
[53] The amendments listed in (a) through (c) were adopted in *In re Amendment to Florida Rule of Criminal Procedure 3.220(h) & Florida Rule of Juvenile* Procedure 8.060(d), 681 So.2d 666 (Fla. 1996).
[54] *Amendment to Florida Rule of Criminal Procedure 3.220(h)(1)*, 710 So.2d 961 (Fla. 1998); *Amendment to the Florida Rules of Juvenile Procedure – Rule 8.060,* 724 So.2d 1153 (Fla. 1998); *Amendment to Florida Rules of Criminal Procedure 3.220(h) and 3.361,* 724 So.2d 1162 (Fla. 1998).

	Court did so in 1988 and ultimately, after holding several meetings across the state, the commission recommended numerous amendments to FRCP 3.220.[44] In its opinion considering the commission's recommendations, the Florida Supreme Court found that evidence taken during the discovery deposition review indicated that depositions are necessary to insure fairness and equal administration of justice and that abuses are not as widespread as originally feared.[45] According to the Court, "Discovery depositions are . . . clearly worth the risk of some minor abuse."[46] Based on its findings, the Court stated that it would retain discovery depositions in all cases, but would amend FRCP 3.220 to curtail abuses. These amendments included: (a) permitting misdemeanor depositions only when good cause is shown; (b) requiring the defendant to fully reciprocate in the discovery process; (c) providing sanctions against either side for abuses; and (d) providing for the videotaping of witnesses under the age of sixteen and for the taking of depositions of fragile witnesses before the trial judge or a special master.[47] After the adoption of these amendments, prosecutors and law enforcement officers continued to argue to the Legislature that discovery depositions should be abolished.[48] In 1995, the Legislature considered abolition of deposition authority conferred by rule for both criminal defendants and juvenile delinquents.[49] However, "[t]he legislation died before reaching the floor after Justice Overton, speaking on behalf of a unanimous Supreme Court, advocated retention of discovery depositions."[50] Thereafter, in late 1995, the Florida

	Supreme Court considered the following two petitions to amend FRCP 3.220 and FRJP 8.060: (a) a petition by the Attorney General, state attorneys, and others to substantially limit the availability of depositions to criminal defendants and to abolish its availability to juveniles; and (b) a petition by the Florida Association of Criminal Defense Lawyers to allow depositions in misdemeanor and criminal traffic offense cases.[51] Both petitions were denied by the Court.[52] Since 1995, the Court has adopted numerous amendments to FRCP 3.220 and FRJP 8.060. Theses amendments have included the following changes: (a) requirements that the state categorize witnesses; (b) conforming FRJP 8.060 to FRCP 3.220; (c) requirements that parties perform discovery obligations in a mutually agreeable manner or as ordered by the court;[53] and (d) authority for attorneys to issue specified subpoenas.[54]
4. Was the rule created or amended in response to a court decision construing a substantive right?	No.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	Yes. There is an indeterminate cost to the state in providing discovery.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
8.075(a)	Constitution	Pre-1984	Pre-1984

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes, according to dicta in a Florida Supreme Court concurring opinion.[55]
2. What new right is created?	The rule, according to dicta, affords juveniles the right to be advised of the ***collateral*** consequences of a plea, i.e., that a plea may have sentence enhancing effects if future crimes are committed.
3. Does the rule expand rights beyond what has been required by court decisions?	Yes. In order to insure that a plea is voluntary, federal and Florida case law hold that defendants need only be advised of the direct, not collateral, consequences of their pleas.[56] This same case law specifies that the fact that a plea may have sentence enhancing effects for future crimes is a collateral consequence. In a concurring opinion involving the voluntariness of an adult defendant's plea, Justice Pariente agreed that current law does not require an adult defendant to be advised of a plea's potential sentencing enhancing effects on future crimes; however, in dicta, she noted that FRJP 8.075(a), unlike FRCP 3.172 governing adult pleas, requires the trial court to ensure that a juvenile understands "the possible consequences" of a plea. Given this, Justice Pariente concluded that, "during the plea colloquy the juvenile should be advised that the adjudication of delinquency may impact the severity of a future sentence."[57]

[55] *Major v. State*, 814 So.2d 424 (Fla. 2002).
[56] *Major,* 814 So.2d at 424; *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991).
[57] *Major*, 814 So.2d at 432.

4. Was the rule created or amended in response to a court decision construing a substantive right?	Yes. The rule is in response to case law holding that the U.S. Constitution requires pleas to be made knowingly and voluntarily.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	Potentially yes. By using the vague verbage "possible consequences" of a plea, the rule may encourage costly litigation over the plea colloquy requirements for juveniles.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
8.075(b)	None	Pre-1984	Pre-1984

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes.
2. What new right is created?	Creates the right for juveniles against whom a petition alleging an act of delinquency has been filed to submit a plan of treatment, training, or conduct in lieu of a plea if agreed to by a supervising agency designated by the court and the state attorney. The rule permits the court to accept or reject the plan.
3. Does the rule expand rights beyond what has been required by court decisions?	Yes. Juveniles have no constitutional or statutory rights to the post-petition, diversionary plan authorized by this rule (this plan is commonly referred to as the Walker Plan). Statute does authorize certain types of delinquency diversionary plans; however, there does not appear to be any statutory authority for the plan described in this rule.
4. Was the rule created or amended in response to a court decision construing a substantive right?	No.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	It may have a negative fiscal impact in that a diversion program may avoid some costs associated with judicial handling of delinquency petitions.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
8.090(a)	None	1973	1/26/95

Corresponding Statute Number: s. 985.219(8) and 985.228(1), F.S.

1. Is the rule inconsistent with the statute?	Yes. **NOTE:** The Juvenile Court Rules Committee recently recommended that F.R.J.P. 8.090(a) be amended to provide that a child shall be brought to an adjudicatory hearing within 90 days of the earlier of either: (1) **the date the summons issued on the filing of the petition was served**; or (2) the date the child was taken into custody. This would cure the issue raised herein. Comments on this amendment will be accepted by the Committee until November 1, 2005, and the proposed amendment will be submitted to the Florida Supreme Court by February 1, 2006.
2. How?	Section 985.219(8), F.S., currently provides that the court's jurisdiction attaches to the child and the case when the first of the two following events occurs: (1) **when the summons is served** (a summons is issued by the Clerk of Court when a petition is filed) on the child and a parent or legal guardian; or (2) when the child is taken into custody. In contrast, F.R.J.P. 8.090(a) provides that a child shall be brought to an adjudicatory hearing within 90 days of the earlier of either: (1) the **date the petition was filed**;[58] or (2) the date the child was taken into custody.

[58] The triggering time of the petition filing date was added by amendment to the juvenile speedy trial rule in 1977. *See In re Florida Rules of Juvenile Procedure,* 345 So.2d 655 (Fla. 1977). Prior to that time, the juvenile speedy trial rule was the same as the adult speedy trial rule, except that it provided for a shorter period in which to hold the adjudicatory hearing, i.e., 90 days versus the adult rule's 180 days for felony trials. Neither the opinion for the 1977 rule amendment nor comments published with the rule indicate why the petition filing date language was added.

	Under these provisions, a petition may be filed; thereby, starting the 90-day speedy trial period under the rule. A law enforcement officer, however, may not be able to serve the summons issued pursuant to the filing of the petition because he or she is unable to locate the child, e.g., the juvenile has moved, has provided incorrect address information, or is evading law enforcement. Once the speedy trial period has expired, the juvenile is permitted to move for discharge of his or her case and during the hearing on that motion, the state must show that it made diligent efforts to serve the summons. Thus, as stated in *C.D. v. State*, the courts have, ". . . judicially imposed a requirement that the State serve the child within the speedy trial time frame."[59] Neither statute nor case law defines what facts constitute diligent efforts by the state; instead, the courts resolve these issues on a case-by-case basis. For example, a Florida appellate court found that the state failed to make diligent efforts where its attempt to serve the summons failed due to incorrect address information provided by the juvenile, but where the state could have obtained the correct address by calling the Department of Health and Rehabilitative Services.[60] If the court finds that diligent efforts have not been made, an adjudicatory hearing must be held within 10 days of the denial of the motion for discharge or the juvenile will be forever discharged from the crime. Unlike F.R.J.P. 8.090(a), the adult rule, F.R.C.P. 3.191, provides that the speedy

[59] *C.D. v. State*, 865 So.2d 605, 609 (Fla. 4th DCA 2004).
[60] *M.A. v. State*, 483 So.2d 511 (Fla. 4th DCA 1986); *See also R.K. v. State*, 778 So.2d 1098 (Fla. 4th DCA 2001) and *J.W. v. State*, 843 So.2d 938 (Fla. 4th DCA 2003) (holding that three unsuccessful attempts by the state to serve a summons at the juvenile's residence during school hours does not constitute diligent efforts to serve the summons).

	trial time period begins to run when a notice to appear (referred to as a summons in the juvenile context) is served upon the adult or the adult is arrested. As such, the court's jurisdiction and the attachment of the defendant's right to speedy trial occur at the same time; thereby avoiding necessity for a hearing to determine the reasons for any inability or failure to serve the notice to appear.
3. Has the statute been held unconstitutional?	No.
4. Does the rule expand rights beyond what has been required by court decisions?	Yes. The rule allows a juvenile in a case where the petition has been filed, but the summons has not yet been served and the juvenile has not been taken into custody, to move for speedy trial discharge before the court's jurisdiction has attached.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	Yes. The rule is an attempt to implement a juvenile's right to speedy trial[61], but it provides juveniles with a procedural avenue to discharge the case prior to the attachment of the court's jurisdiction.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	Yes. The rule provides for discharge of a crime in circumstances that do not amount to constitutional deprivation of a juvenile's right to speedy trial.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	The inconsistency between rule and statute results in court, prosecution, and defense costs for the conduct of speedy trial hearings to determine the reasons for any inability or failure to serve the summons within the 90-day speedy trial time period.

[61] *See* Rule Review Form for 8.090, generally (discussing the derivation of a juvenile's right to speedy trial).

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
8.090 generally	None	1973	1/26/95

Corresponding Statute Number: s. 85.222, F.S.

1. Is the rule inconsistent with the statute?	The rule provides speedy trial rights to juvenile delinquents. Specifically, it requires an adjudicatory hearing within 90 days following custody or the filing of a petition. In general, the rule is not inconsistent with current statute.[62] Section 985.228(1), F.S., provides that an adjudicatory hearing should be held as soon as practicable after the petition is filed and, ". . . ***in accordance with the Florida Rules of Juvenile Procedure***; but reasonable delay for the purpose of investigation, discovery, or procuring counsel or witnesses shall be granted (emphasis added)." What is notable, however, is that the rule demonstrates sua sponte creation via rule by the Florida Supreme Court of a juvenile constitutional and procedural rights to speedy trial and the Legislature's subsequent ratification of that act. Please see discussion *infra*.
2. How?	N/A
3. Has the statute been held unconstitutional?	No.
4. Does the rule expand rights beyond what has been required by court decisions?	Yes. ***Constitutional speedy trial right:*** The United States (U.S.) Supreme Court has held that adult defendants are entitled to speedy trial under the 6th Amendment of the U.S. Constitution and that this right is applicable to the states by virtue of the Due

[62] *But see* Rule Review Form for FRJP 8.090(a).

	Process Clause of the 14th Amendment of the U.S. Constitution.[63] Similarly, the Florida Constitution provides for the right to speedy trial in all criminal prosecutions.[64] The U.S. Supreme Court has refused to establish a specific time period for speedy

[63] *See Klopfer v. State of North Carolina*, 386 U.S. 213, 223 (1967).
[64] Article 1, s. 16 of the Florida Constitution.
[65] *Barker v. Wingo*, 92 S.Ct. 2182, 2188 (1972).
[66] *Doggett v. U.S.*, 112 S.Ct. 2686, 2690 (1992).
[67] *Barker*, 92 S.Ct. at 2193.
[68] *Id.*
[69] The U.S. Supreme Court has held that not all criminal trial requirements are applicable to juvenile delinquency proceedings. For example, the right to jury trial is not applicable in such proceedings. *McKeiver v. Pennsylvania*, 91 S.Ct. 1976, 1986 (1971). However, the Court has ruled that delinquency proceedings must "measure up to the essentials of due process and fair treatment" and has held that juvenile delinquents are constitutionally afforded rights that include: written notice of charges; counsel; hearings; privilege against self-incrimination; and cross-examination of adverse witnesses. *In re Gault*, 87 S.Ct. 1428, 1445 (1967). Additionally, the Court has stated that the Due Process Clause of the 14th Amendment of the U.S. Constitution requires proof beyond a reasonable doubt in juvenile proceedings. *In re Winship*, 90 S.Ct. 1068, 1073 (1970).
[70] *State v. Boatman*, 329 So.2d 309, 311 (Fla. 1976); *State v. Benton*, 337 So.2d 797, 798 (Fla. 1976).
[71] *M.M. v. State*, 281 So.2d 916 (Fla. 3rd DCA 1973)(holding that the adult speedy trial rule did not apply to juveniles and that the juvenile was not entitled to discharge due to state's failure to bring to adjudicatory hearing within 90 days as 90-day juvenile speedy trial rule was not effective at time of juvenile's case).
[72] *Boatman* at 311-312.
[73] The Florida Supreme Court opinion in which this rule was adopted does not specifically discuss the speedy trial rule; instead, it only indicates that this rule and others were being adopted to effect an orderly transition of the courts under the 1972 amendment to the Florida Constitution, which placed juvenile court jurisdiction in the circuit court. *In re Transition Rule II*, 270 So.2d 715 (Fla. 1972). Further, staff reviewed the Supreme Court file on this opinion, which is maintained by State Archives, but no comments or other documentation discussing the adoption of the juvenile speedy trial rule were found.
[74] *R.J.A. v. Foster*, 603 So.2d 1167, 1171 (Fla. 1992)(stating "We do not believe the legislature intended by its enactment of section 39.048(7) to establish a much greater right to a speedy trial than is granted by the constitution by making the violation of a statutorily enacted time period per se prejudicial.").
[75] *See* House Report to the Committee on Health and Rehabilitative Services for HB 1956 at p. 9 (June 15, 1978)(stating that, "**The [bill's] provision for a 90-day speedy trial is currently provided in the Rules of Juvenile Procedure and was included in the statute for emphasis.**")(emphasis added); Senate Staff Analysis and Economic Statement for CS/CS SB 119 at p. 2 (June 7, 1978)(stating that, "The mandatory dismissal of a delinquency petition not filed within 30 days from complaint referral date is extended to 45 days and the right to speedy trial within 90 days is provided. The speedy trial provision is in the Florida Rules of Juvenile Procedure.").
[76] *State ex rel. Maines v. Baker,* 254 So.2d 207 (Fla. 1971). (holding that, "The questioned rule [F.R.C.P. 3.191, the adult speedy trial rule] merely provides the procedures through which the constitutional right to a speedy trial is enforced in this state, and, as such, is a proper exercise of the Court's constitutional power to promulgate rules of practice and procedure.")
[77] *R.J.A.*, 603 So.2d at 1171-1172.
[78] *Id.*
[79] *Id.* at 1174-1175.
[80] *State v. Naveira,* 873 So.2d 300 (Fla. 2004).
[81] *Naveira*, 873 So.2d at 308 (citations omitted).

	trial, explaining that: > [S]uch a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.[65] The less precise approach created by the Court is a balancing test that requires consideration of the following four factors: (1) whether the delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice as a result of the delay.[66] These four factors, however, "have no talismanic qualities."[67] Instead, "courts must still engage in a difficult and sensitive balancing process" and should consider these factors "together with such other circumstances as may be relevant."[68] The above discussed constitutional speedy trial right decisions have been rendered only in the context of adult proceedings. With regard to delinquency proceedings, the U.S. Supreme Court has <u>never</u> ruled that juveniles are constitutionally entitled to speedy trial.[69] Instead, this issue has been determined state-by-state, and, as discussed below, in Florida juveniles were not accorded any speedy trial rights until

	1973. ***Rule and statutory speedy trial rights:*** Prior to 1973, there was no speedy trial rule applicable to juveniles in Florida.[70] [71] FRJP 8.120, now FRJP 8.090, providing speedy trial for juveniles, became effective on January 1, 1973.[72] It appears that this rule was the first time juveniles were accorded a speedy trial right in Florida. Staff is unable to locate any opinion by the Court, which specifically discusses its reasoning for granting of this right.[73] In a 1992 case, the Court briefly mentioned that the juvenile right to speedy trial is granted by the constitution; however, this statement is without explanation or citation.[74] It does not appear that a juvenile right to speedy trial was accorded by Florida Statute prior to 1978. In that year, the Florida Legislature codified then FRJP 8.120 with the enactment of s. 39.05(7), F.S., in ch. 78-414, L.O.F. Additionally, this chapter law amended s. 39.09(1), now s 985.228(1), F.S., to provide, as it continues to provide today, that adjudicatory hearings shall be held as soon as practicable after the petition is filed and in accordance with the Florida Rules of Juvenile Procedure. Legislative staff analyses indicate that the changes made by this chapter law were intended to emphasize the juvenile speedy trial rule and were a replacement for statute's earlier provisions requiring dismissal of a delinquency petition that was not filed within 30 days following the complaint referral date.[75] The Florida Supreme Court has held that both FRCP 3.191, the adult speedy trial rule, and FRJP 8.090, the juvenile speedy trial rule, are procedural and take precedence over inconsistent statute.[76] [77] For example in *R.J.A. v. State*, the Court

	held that its rule's provision of a procedural 90-day speedy trial period and 10-day recapture period trumped statute providing only for a 90-day speedy trial period.[78] Justices Barkett and Kogan dissented in this case, stating that it is the Legislature's prerogative to establish a speedy trial period, in both the adult and juvenile contexts, as such period is substantive, not procedural.[79] Further, the Florida Supreme Court has held that the right to speedy trial afforded by rule is not the same as the constitutional right to speedy trial.[80] Rather, the "speedy trial rule is a procedural protection and, except for the right to due process under the rule, does not reach constitutional dimension.' As opposed to the right provided in the rule, '[t]he test of the constitutional speedy trial period is measured by tests of reasonableness and prejudice, not specific numbers of days.'"[81]
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	Yes. The rule grants delinquents the right to speedy trial within 90 days and there is no such specific requirement in the state or federal constitutions. The standard of 90 days could in some cases operate as a stricter test for speedy trial than the constitutionally required test of reasonableness and prejudice; e.g., in some cases, the right to speedy trial within 90 days as accorded by the rule could result in dismissal of a case even though dismissal may not have been required if the constitutional test of reasonableness and prejudice had been applied.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	With regard to constitutionally required rights, yes. The rule grants delinquents the right to speedy trial within 90 days and there is no such specific requirement in the

	state or federal constitutions, nor is there any U.S. Supreme Court case law holding that juveniles have a constitutional right to speedy trial. With regard to statute, Section 985.228(1), F.S., requires that an adjudicatory hearing be held as soon as practicable after the petition and, ". . . ***in accordance with the Florida Rules of Juvenile Procedure . . .***"
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	The granting of a juvenile speedy right may result in additional costs to the state for the expedition of juvenile adjudicatory hearings and for litigation resulting from juvenile invocation of the right.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
8.165	Constitution	Pre-1977	1-27-05

Corresponding Statute Number: s. 985.203, F.S.

1. Is the rule inconsistent with the statute?	The Florida Supreme Court has stated its intention to reconsider a proposed rule amendment that would expand the statutory requirements for counsel in delinquency proceedings if such expansion was not addressed by the Legislature during the 2005 Session.[82] In 1967, the United States Supreme Court held that juveniles are constitutionally entitled to counsel in delinquency cases.[83] Section 985.203(1), F.S., implements this right by requiring a juvenile, who is alleged to be delinquent, to be represented by legal counsel at all stages of all court proceedings, unless the right to counsel is freely, knowingly, and intelligently waived. Further, the subsection requires the court to advise the juvenile of his or her rights to court appointed counsel if the child appears without counsel. F.R.J.P. 8.165 requires courts to advise a juvenile of his or her right to counsel and to appoint counsel unless the right is waived **at each state of the proceeding** in accordance with the following requirements: (a) the court must thoroughly inquire into the child's comprehension of the offer of counsel and into the child's capacity to make his or her choice intelligently and understandingly;[84] (b) the

[82] *Amendments to the Florida Rules of Juvenile Procedure,* 894 So.2d 875, 877, 880-881 (Fla. 2005).
[83] *In re Gault*, 387 U.S. 1, 36-37 (1967).
[84] With regard to the requirement of a thorough inquiry, the Florida Supreme Court has stated, "The 'requirement of a detailed inquiry recognizes that '[i]t is extremely doubtful that any child of limited experience can possibly comprehend the importance of counsel.' P.L.S. v. State, 745 So.2d 555, 557 (Fla. 4th DCA 1999) (quoting *G.L.D. v. State*, 442 So.2d 401, 404 (Fla. 2d DCA 1983)). Although the inquiry for juveniles must be at least equal to that accorded adults, courts should be even more careful when

	waiver must be in writing; and (c) if the waiver is occurring at a plea or adjudicatory proceeding, the written waiver must be signed by a parent, guardian, responsible adult relative, or a court-assigned attorney, who shall verify that the juvenile's waiver appears knowing and voluntary. Earlier this year, the Florida Supreme Court considered three amendments to F.R.J.P. 8.165, which were based upon recommendations from the Florida Bar Commission on the Legal Needs of Children and offered by the Juvenile Court Rules Committee.[85] Two of these amendments were adopted by the Court; i.e., requirements (b) and (c) outlined above.[86] The Court declined to adopt the third proposed amendment.[87] The third amendment would have required juveniles to be provided with a meaningful opportunity to confer with an attorney before waiving counsel.[88] According to the Court, this amendment would be, ". . . an important additional safeguard designed to protect a juvenile's constitutional right to counsel . . . ." However, the Court declined to adopt it due to its potential fiscal impact and instead invited the Legislature to address this issue.[89] [90] The Court stated: Because of our desire to work

accepting a waiver of counsel from juveniles. See *K.M. v. State*, 448 So.2d 1124, 1125 (Fla. 2d DCA 1984)." *State v. T.G.*, 800 So.2d 204, 210-211 (Fla. 2001).

[85] *Amendments to the Florida Rules of Juvenile Procedure,* 894 So.2d at 877.

[86] *Id.* at 877, 881.

[87] *Id.* at 881.

[88] *Id.* at 877.

[89] *Id.* at 881.

[90] Regarding fiscal impact, the Court stated, "Although the public defenders stated that they do not anticipate a direct fiscal impact because in many circuits these procedures [pre-waiver consultation with an attorney] are already being followed, supplemental comments filed by the FPDA indicate that at least two circuits, the Sixth and Twelfth, may experience a significant fiscal impact, including the need for additional employees, should rule 8.165 be amended as proposed." *Id.* at 878.

[91] *Id.* at 880-881.

[92] CS/SB 1218 (2005).

	cooperatively with the Legislature, we urge the Legislature to consider the Commission's recommendations. We also strongly urge that the voluntary practice that exists in many jurisdictions in which consultation with an attorney takes place be continued and, where possible, expanded in the interim. We thus decline to adopt at this time the portion of rule 8.165(a) regarding consultation with an attorney prior to a waiver. We emphasize that we are not rejecting this proposed amendment to rule 8.165(a), but are merely deferring its consideration. We intend to readdress the adoption of the amendment to rule 8.165(a) at a future time following the conclusion of the legislative session.[91] During the 2005 Regular Session, legislation was filed in the Senate, which would have amended s. 985.203(1), F.S., to require that a juvenile be provided with a meaningful opportunity to confer with counsel prior to waiver of the right to counsel.[92] This bill had no House companion and ultimately died in the Senate Judiciary Committee. How much longer the Court will defer its reconsideration of the proposed rule amendment is unknown.
2. How?	See above.
3. Has the statute been held unconstitutional?	No.
4. Does the rule expand rights beyond what has been required by court decisions?	Not at the present time.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right	Not at the present time.

that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	No. The proposed rule amendment that the Court intends to reconsider would expand the substantive right if adopted.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	Yes. According to the staff analysis for CS/SB 1218, the fiscal impact of requiring a public defender to advise a juvenile of his or her rights before being permitted to waive counsel would be minimal; however, there could be a potentially significant, but indeterminate fiscal impact if the number of juveniles choosing to not waive public defender representation increases.[93]

[93] Senate Staff Analysis for CS/SB 1218 at pp. 2-3 (April 7, 2005).

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
8.350	None	3/6/03	Has not been amended.

Corresponding Statute Number: s. 39.407, F.S.

1. Is the rule inconsistent with the statute?	Yes.
2. How?	Section 39.407(6), F.S., governs the rights of dependent children who are placed in residential treatment centers by the Department of Children and Families (DCF). Statutory requirements that must be met prior to admission include the following: (a) appointment of a guardian ad litem (GAL); (b) a determination by the DCF that the child is emotionally disturbed and requires treatment, and that no less restrictive alternatives are available; and (c) an examination of the child by a qualified evaluator and completion of a written assessment by that evaluator, which supports the admission.[94] Post-admission statutory requirements include: (a) creation of an individualized treatment plan within 10 days after admission; (b) review of the appropriateness and suitability of the placement by the residential treatment program every 30 days after admission; and (c) conduct of a court hearing to review the child's status within three months after admission and continued review by the court every 90 days thereafter.[95] F.R.J.P. 8.350 contains similar requirements, but unlike s. 39.407(6), F.S., the rule also requires the following prior to placement: (a) the filing of a motion for placement by the DCF with the court; (b) the conduct of a court hearing within 48 hours after the filing of a motion for placement; and (c) the appointment of

[94] Section 39.407(6), F.S.
[95] *Id.*

	counsel for a child who does not agree with the placement.[96] The only exception to these requirements is that a child may be placed immediately when the qualified evaluator finds such placement required and the court does not order otherwise.[97]
3. Has the statute been held unconstitutional?	No.
4. Does the rule expand rights beyond what has been required by court decisions?	Yes. In *M.W. v. Davis,* the Florida Supreme Court ruled, based upon United States Supreme Court case law, that there are three due process requirements for a child who is being residentially committed: (1) an inquiry by a neutral fact-finder, who need not be a lawyer or judge; (2) the probing of the child's background using all available resources during the inquiry; and (3) a periodic review of the commitment by a neutral fact-finder.[98] The Court never held in *M.W.* or any subsequent case to date that the state or federal constitution requires an adversarial pre-commitment hearing or the appointment of counsel in this context. Instead, the Court in *M.W.*: (a) merely suggested that the granting of the rights of hearing and counsel was desirable for reasons that included facilitating the child's belief, ". . . that he or she is being listened to and that his or her opinion is respected and counts . . ."; and (b) directed the Juvenile Court Rules Committee (hereinafter "Committee") to submit a proposed rule that would set forth required procedures, including a hearing, for courts prior to ordering

[96] F.R.J.P. 8.350(a)(4), (6), (7), and (10).
[97] F.R.J.P. 8.350(a)(5).
[98] *M.W. v. Davis*, 756 So.2d 90, 99 (Fla. 2000).

	residential treatment for dependent children.[99] Shortly after the release of *M.W.*, ch. 00-265, L.O.F. was enacted by the Legislature. This legislation created the statutory requirements now contained in s. 39.407(6), F.S., for the commitment of dependent children and which appear to provide more due process than that required by the Court in *M.W.* That is, the Legislature required: (a) multiple inquiries by neutral parties into the background of a dependent child sought to be committed by the DCF, e.g., inquiries by the GAL, qualified evaluator, and court; and (b) periodic review of the child's treatment by the court and by the residential treatment program. In a 2001 opinion, the Florida Supreme Court reviewed s. 39.407, F.S., as amended in 2000, and the rule proposed by the Committee in response to the Court's direction in *M.W.*[100] [101] The Court noted that the proposed rule did not provide a dependent child with a right to a pre-commitment hearing nor a right to counsel

[99] *M.W.*, 756 So.2d at 108-109.
[100] *Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350,* 804 So.2d 1206 (Fla. 2001).
[101] The proposed rule was approved by the Committee by a vote of 18-7-0 and by the Florida Bar Board of Governors by a vote of 8-3. *"Please Let Me be Heard:" The Right of a Florida Foster Child to Due Process Prior to being Committed to a Long-Term, Locked Psychiatric Institution,* 25 Nova L. Rev. 725, 749, Spring 2001.
[102] *Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350,* 804 So.2d at 1207-1208.
[103] The reasoning cited by the Court in support of a right to pre-commitment hearing was even though s. 39.407(5), F.S., as amended in 2000, provided for an extensive process of post-placement evaluations and reviews, the potential remained for a child to be committed for more than one month before any court addressed the propriety of the placement. *Id.* at 1211-1212. The reasoning cited by the Court in support of a right to counsel included that: (a) a child cannot have a meaningful opportunity to be heard and present evidence without an attorney; (b) the child's position may never be advanced if the child disagrees with the position of the GAL and/or the GAL's attorney; and (c) therapeutic jurisprudence demonstrates that a, ". . . dependent child's perception of whether he or she is being listened to and whether his or her opinion is respected and counted is integral to the child's behavioral and psychological process." *Id.* at 1210-1211.
[104] *Id.* at 1214-1215.
[105] *Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350,* 842 So.2d 763 (Fla. 2003).
[106] *Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350,* 842 So.2d at 765.
[107] *Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350,* 804 So.2d at 1216-1217; *Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350,* 842 So.2d at 769-770.

	and then discussed numerous policy reasons that supported the granting of such rights.[102] [103] Given these reasons, the Court stated that it would publish a new rule providing for these rights.[104] In 2003, the Court adopted its proposed rule, as amended pursuant to comments received from the Committee. This rule is now codified as F.R.J.P. 8.350 and, as discussed above, it provides the rights to both a pre-commitment hearing and counsel for dependent children sought to be committed by the DCF.[105] The rule accords the right to counsel to the dependent child notwithstanding the fact that s. 39.407(6), F.S., requires the appointment of a third-party, neutral GAL for the purpose of advocating the best interest of a dependent child sought to be committed by the DCF. The attorney provided by rule is placed in an adversarial position to that of the GAL. The role of the attorney is not to act in the child's best interest, but rather to represent the stated interest of the emotionally disturbed child.[106] In both of the Court's opinions discussing the adoption of F.R.J.P. 8.350, Justice Wells dissented stating that: (a) the Court should not adopt a rule that was rejected by the Committee by a vote of 18 to 7; (b) the Court has no authority to create a right to counsel via rule where such right is not mandated by the Constitution or statute; (c) the requirement of counsel is unfunded and will result in an overwhelming and frustrating burden; and (d) the necessity for counsel for the child is questionable.[107]
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than	No. F.R.J.P. 8.350 creates additional substantive rights to hearing and counsel.

the substantive right it is designed to enforce or implement?	
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	Yes.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	Yes. The staff analysis for HJR 1007, as filed during Regular Session 2004-2005, indicates that the DCF anticipated an unfunded, annual fiscal impact of more than $1,000,000 to implement F.R.J.P. 8.350.[108]

[108] House Staff Analysis for HJR 1007 at p. 5 (March 16, 2005).

Civil Procedure

Civil Procedure

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
1.221	718.111	1977	1980-renumbered

Corresponding Statute Number: s. 718.111, F.S.

1. Is the rule inconsistent with the statute?	No.
2. How?	N/A
3. Has the statute been held unconstitutional?	Yes, in *Avila v. Kappa Corp.* 347 So. 2d 599 (Fla. 1977). The Legislature amended the statute subsequently by removing the offending provisions in a reviser's bill. The current rule parrots the previous statute. The current rule provides that condominium associations have standing to bring actions, including class actions, on behalf of the condominium owners on certain matters of common interest. The rule also specifies that condominium associations are to use rule 1.221 and not 1.220, which governs class actions in general.
4. Does the rule expand rights beyond what has been required by court decisions?	No.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	No, rule is same as previous statute.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	No.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
1.222	723.079	1988	N/A

Corresponding Statute Number: s. 723.079, F.S.

1. Is the rule inconsistent with the statute?	No.
2. How?	N/A
3. Has the statute been held unconstitutional?	Yes, in *Lanca Homeowner's, Inc. v. Lantana Cascade of Palm Beach, Ltd.*, 541 So. 2d 1121 (Fla. 1988). The Legislature amended the statute subsequently by removing the offending provisions in a reviser's bill. The current rule parrots the previous statute. The current rule provides that mobile homeowners' associations have standing to bring actions, including class actions, on behalf of the mobile homeowners on certain matters of common interest. The rule specifies that mobile homeowners are to use rule 1.222 and not 1.220, which governs class actions in general.
4. Does the rule expand rights beyond what has been required by court decisions?	No.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	No, rule is same as previous statute.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	No.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
1.270(b)	Court. Rulemaking Authority	1954	1993

Corresponding Statute Number: s. 702.01, F.S.

1. Is the rule inconsistent with the statute?	Yes.
2. How?	The rule provides discretion to a court to sever counterclaims and the statute requires a court to sever counterclaims, making severance mandatory.
3. Has the statute been held unconstitutional?	Yes, in *Haven Federal v. Kirian* 579 So. 2d 730 (Fla. 1991). The statute has not changed since the court found it unconstitutional and it remains inconsistent with the rule.
4. Does the rule expand rights beyond what has been required by court decisions?	No.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	No.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	No.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Appellate Procedure

Appellate Procedure

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
9.140(b)(2)		Pre-1970	4/7/05

Corresponding Statute Number: s. 924.051(4), F.S.

1. Is the rule inconsistent with the statute?	Yes.
2. How?	Section 924.051(4), F.S., as created by the "Criminal Appeal Reform Act of 1996,"[109] prohibits a defendant, who enters a plea of nolo contendere or guilty, from appealing his or her judgment or sentence unless he or she expressly reserves the right to appeal a legally dispositive issue. To implement this statutory section, the Florida Supreme Court, effective January 1, 1997, added new language to FRAP 9.140(b)(2) for the purpose of addressing appeals from guilty or nolo contendere pleas. Similar to s. 924.051(4), F.S., FRAP 9.140(b)(2) currently requires reservation of the right appeal a prior dispositive order of the court by persons who plead guilty or nolo contendere; however, unlike the statute, the rule also provides for such persons to directly appeal if arguing: (a) a lack of lower court subject matter jurisdiction; (b) a violation of the plea agreement, if preserved by a motion to withdraw plea; (c) an involuntary plea, if preserved by a motion to withdraw plea; (d) a sentencing error, if preserved; or (e) as otherwise provided by law.
3. Has the statute been held unconstitutional?	Section 924.051(4), F.S., has not been held unconstitutional; however, the Florida Supreme Court has implemented this subsection of statute in a manner inconsistent with its express language. *See* Number 5., *infra.*

[109] Ch. 96-248, L.O.F.

4. Does the rule expand rights beyond what has been required by court decisions?	No as to Florida court decisions.
5. Was the rule created or amended in response to a court decision construing a substantive right?	Yes. Criminal defendants do not have a federal constitutional right to direct appeal; however, the Florida Supreme Court has held that Art. V, s. 4(b)(1) of the Florida Constitution[110] provides criminal defendants with the right to appeal.[111] The Court has stated that, " . . . the Legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights."[112] With that in mind, the Court has construed s. 924.051(4), F.S., as permitting direct appeals from guilty and nolo contendere pleas which argue one or more of the following four exceptions: (1) a lack of subject matter jurisdiction;[113] (2) a violation of a plea agreement; (3) an involuntary plea; or (4) an illegal sentencing error. These four exceptions are based upon the Court's holding in *Robinson v. State*,[114] wherein the Court construed the 1977 version of s. 924.06(3), Florida Statutes (1977), which prohibited direct appeals from guilty or nolo contendere pleas, as codifying existing case law that allows appeals of conduct that would invalidate the plea itself. Applying this rationale to the 1996 version of s. 924.051(4), F.S., the Court has stated,

[110] Art. V, s. 4(b)(1) of the Florida Constitution states, "District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court."

[111] *Amendments to the Florida Rules of Appellate Procedure,* 696 So.2d 1103, 1104 (Fla. 1996).

[112] *Amendments to the Florida Rules of Appellate Procedure,* 696 So.2d at 1104.

[113] A lack of subject matter jurisdiction constitutes fundamental error. *J.D. v. State*, 849 So.2d 458, 460 (Fla. 4th DCA 2003); *Booker v. State,* 497 So.2d 957 (1st DCA 1986); *Bould v. Touchette,* 349 So.2d 1181, 1186 (Fla. 1977).

[114] *Robinson v. State*, 373 So.2d 898 (Fla.1979).

	"Insofar as it [924.051(4), F.S.] says that a defendant who pleads nolo contendere or guilty without expressly reserving the right to appeal a legally dispositive issue cannot appeal the judgment, we believe that the principle of *Robinson* controls. A defendant must have the right to appeal that limited class of issues described in *Robinson*."[115] Additionally with regard to sentencing errors, the Court has recognized that a defendant has not yet been sentenced at the time of the plea and as such, cannot expressly reserve a sentencing error that has not yet occurred. For this reason, the Court has construed s. 924.051(4), F.S., as permitting a defendant who pleads guilty or nolo contendere to appeal a sentencing error if it has been timely preserved by motion to correct the sentence.[116] Accordingly, based upon the above discussed construction of s. 924.051(4), F.S., the Court has adopted FRAP 9.140(b)(2)(A)(ii) to permit direct appeals from guilty and nolo contendere pleas based upon arguments asserting: (a) a lack of lower court subject matter jurisdiction; (b) a violation of the plea agreement, if preserved by a motion to withdraw plea; (c)

[115] *Amendments to the Florida Rules of Appellate Procedure,* 696 So.2d at 1105.
[116] *Id.*
[117] An issue is dispositive only when it is clear that regardless of the outcome of the appeal, there will be no trial. *Vaughn v. State*, 711 So.2d 64, 65 (Fla. 1st DCA), rev. denied, 722 So.2d 195 (1998).
[118] *Leonard v. State,* 760 So.2d 114, 118 (Fla. 2000).
[119] *Harvey v. State*, 848 So.2d 1060 (Fla. 2003).
[120] *Harvey v. State*, 786 So.2d 595, 596 (Fla. 1st DCA 2001).
[121] *Heggs v. State*, 759 So.2d 620 (Fla. 2000).
[122] *Harvey*, 786 So.2d at 596.
[123] FRCP 3.800(b) currently provides that non-death penalty defendants or the state may file a motion to correct a sentencing error in the trial court either before appeal or while an appeal is pending.
[124] *Harvey*, 786 So.2d at 597-598.
[125] *Id.*
[126] *Harvey*, 848 So.2d at 1063-1064.
[127] *Id.*
[128] *Id.* at 1067.
[129] *Id.* at 1069 (footnotes and citations omitted).
[130] *Brannon v. State,* 850 So.2d 452, 456-459 (Fla. 2003).

	an involuntary plea, if preserved by a motion to withdraw plea; (d) a sentencing error, if preserved; or (e) as otherwise provided by law. This rule is inconsistent with the express language of s. 924.051(4), F.S., which only allows preserved, legally dispositive[117] issues to be appealed in guilty and nolo contedere plea cases, in that the rule permits unpreserved lack of subject matter jurisdiction issues and preserved, post-plea issues to be raised on appeal. However, the Florida Supreme Court has stated that construction of s. 924.051(4), F.S., so that it permits such appeals is supported by legislative history indicating that the subsection, ". . . was intended to 'basically codify' this Court's decision in *Robinson*. See Fla. H.R. Comm. on Crim. Just., CS for HB 211 (1996) Staff Analysis 5-6 (Nov. 4, 1996)."[118] Even if it is the case that the Legislature intended to codify existing case law when it enacted s. 924.051(4), F.S., in 1996, this argument does not appear to legitimize the Court's recent extension of its rule in *Harvey v. State*[119] to authorize direct appeals for a narrow category of unpreserved sentencing errors in guilty and nolo contendere plea cases. In *Harvey*, the defendant filed an *Anders* brief on February 10, 2000.[120] Seven days later the Florida Supreme Court issued its decision in *Heggs v. State,*[121] which held that the 1995 sentencing guidelines were an unconstitutional violation of the single subject rule. Thereafter, Harvey filed a motion to withdraw his *Anders* brief and an initial brief arguing that he was entitled to resentencing under *Heggs*.[122] The First District Court denied Harvey's appeal holding that Harvey had failed to preserve the issue with a FRCP 3.800(b) motion to

	correct a sentencing error.[123] [124] According to the First District, the fact that *Heggs* was decided after Harvey had filed his *Anders* brief was without consequence as Harvey was on notice that *Heggs* was pending at the time of his *Anders* brief and, thus, could have filed a FRCP 3.800(b) motion to have preserved this argument.[125] Harvey appealed to the Florida Supreme Court and it reversed the First District's decision.[126] A majority of the Court stated that Harvey, ". . . should not be penalized for his appellate counsel's failure to file a rule 3.800(b)(2) motion based on speculation that our opinion in *Heggs* would disapprove the First District's decision in *Trapp*. Harvey had no sentencing error to complain of at the time he filed his *Anders* brief on February 10, 2000. We issued our decision in *Heggs* a week later, which created a unique situation--a sentencing error developed that did not exist before the first brief was filed. * * * Due to the interests of justice, judicial efficiency, and the unique circumstances of this case, we permit Harvey to raise his *Heggs* error as a fundamental sentencing error for the first time on appeal."[127] Justices Wells and Cantero dissented. They stated that the majority was setting, ". . . upon a course of finding 'exceptions' . . ." to precedent and FRAP 9.140(b)(2), which requires preservation of sentencing error via a FRCP 3.800(b) motion.[128] Further, they stated, "The majority . . . embarks on the exception course by reasoning that 'Harvey had no sentencing error to complain of at the time he filed his Anders brief on February 10, 2000.' Clearly though, as stated in Judge Wolf's opinion, this is wrong since the *Heggs* issue was being reviewed by this Court at that time. To the contrary, there was no reason that the issue could not and should not have

	been presented to the trial court, if appellant intended to preserve it, in view of the clear language of rule 9.140(e), which stated that it had to be presented, and rule 3.800(b), which provided the procedural mechanism by which an allegation of error was to be presented."[129] More recently in *Brannon v. State*,[130] the Court reaffirmed its precedent prohibiting the consideration of unpreserved, fundamental sentencing error on direct appeal and indicated that its decision in *Harvey* is strictly limited to allowing direct appeals for unpreserved fundamental sentencing error where that error had not been declared in any appellate decision binding on the trial court at the time of the defendant's first appellate brief.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	Yes. The Court has expanded the right to appeal by creating exceptions to statute and its own rules and precedent that prohibit the appeal of unpreserved error in guilty and nolo contendere plea cases.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	Does not appear to.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	Permitting unpreserved error to be raised in guilty and nolo contendere plea cases results in indeterminate state costs for appellate litigation.

Judicial Administration

Judicial Administration

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
Rule of Judicial Administration 2.030(a)(3)(B)		7-1-78 [360 So.2d 1076]	1-1-97 [682 So.2d 89]

Corresponding Statute Number: s. 25.073, F.S.

1. Is the rule inconsistent with the statute?	Yes.
2. How?	The definition of "retired judge" in this rule does not include the element of having not been defeated in seeking reelection or retention in his or her last judicial office as is contained in the statutory definition at s. 25.073(1), F.S. Further, this rule does not mention the 60-day maximum time allowed to serve during a year as a retired justice/judge. See s. 25.073(2)(a), F.S.
3. Has the statute been held unconstitutional?	No.
4. Does the rule expand rights beyond what has been required by court decisions?	No.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	No.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	No.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	N/A

Family Law

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
12.285		1995	

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes.
2. What new right is created?	This rule gives a party a right to receive extensive financial and personal information regarding the other party involved in the case. Providing this information is required of the parties and cannot be waived. Providing this information is required even where the parties have agreed to a financial settlement of the case and the information is not necessary to resolution of the case. Also, this rule contains a rule of evidence providing for exclusion of evidence. See Rule 12.285(f). This rule of evidence was not created by statute.
3. Does the rule expand rights beyond what has been required by court decisions?	Yes.
4. Was the rule created or amended in response to a court decision construing a substantive right?	No.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	The rule appears to require the expenditure of state funds for implementation. This rule, and Rule 12.105(c), causes clerks of courts to receive, file and maintain substantially larger files. In addition, Rule 12.105(e) requires the employment of court personnel to provide free legal assistance to parties in preparing the required forms and disclosures. If the forms were not required, court personnel would not have to expend time and resources in helping parties complete the forms.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
12.400		1995	2003

Corresponding Statute Number: Chapter 119, F.S.

1. Is the rule inconsistent with the statute?	Yes.
2. How?	This rule appears to create a public records exemption that is not provided for in statute. Prior to 1992, the Supreme Court could create public records exemptions applicable to court files by either rule or court decision. In 1992, the constitution was amended to provide that only the legislature may create a public records exemption. Exemptions created by a rule or decision prior to 1992 are grandfathered in.
3. Has the statute been held unconstitutional?	No.
4. Does the rule expand rights beyond what has been required by court decisions?	It appears that the rule may expand an individual's right to conceal court records from public view beyond the rights provided for in constitution and statute. The rule appears to create a public records exemption by limiting public access to portions of court files that contain financial information of the parties. The exemption appears broader than the limited exemption set out in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988) (ruling that divorce files of a state senator are a public record). However, a footnote from enactment of the rule claims that it does not "change the burden of proof for closure of file records" set forth in the *Barron* decision. (note: *Barron* was the last major ruling regarding public access to divorce files prior to 1992).
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to	Yes.

enforce or implement?	
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	Yes, the rule appears to create a vested right in private court records. The rule expands an individual's right to conceal court records from public view beyond the rights provided for in the state constitution or in state statutes. The legislature has not created a corresponding public records exemption that authorizes this rule. There is no federal constitutional or statutory right to private court files.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
12.610(b)(4)		1995	2003

Corresponding Statute Number: s. 741.30(2)(c), F.S.

1. Is the rule inconsistent with the statute?	Yes.
2. How?	The statute provides that the clerk of the court must assist a petitioner seeking a domestic violence injunction. The rule adds that the duty to assist petitioners may be assigned to "court intake staff."
3. Has the statute been held unconstitutional?	No.
4. Does the rule expand rights beyond what has been required by court decisions?	No.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	No.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	No.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Probate

Probate

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
5.030		1967, superseded in 1976 and revised thereafter	1992. Committee notes were revised in 2003 and 2005.

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	The rule requires every guardian and every personal representative, unless the personal representative remains the sole interested person, to be represented by an attorney admitted to practice in Florida. There is no corresponding statute either requiring legal representation nor prohibiting lay representation.
2. What new right is created?	The rule appears to create more of a responsibility than a right.
3. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	The Supreme Court relies on its constitutional authority to regulate the practice of law pursuant to Article V, section 15 of the Florida Constitution. The Florida Supreme Court has held that the authority to regulate the practice of law also includes the authority to prevent the unlicensed practice of law. State ex rel. Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963). The Court has also held that in the absence of legislative authorization for lay representation, conduct which constitutes the practice of law is subject to the Court's constitutional responsibility to protect the public from the unauthorized practice of law. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). The question arises whether under the separation of powers doctrine in Article II, section 3 of the Florida Constitution, the Court's authority to prevent the unauthorized practice of law should only be used when the legislature authorizes or

	prohibits lay representation, rather than in the absence of legislative action.
4. Was the rule created or amended in response to a court decision construing a substantive right?	No.
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	Requiring guardians and personal representatives to have attorney representation would have a fiscal impact on the guardian and the personal representative.

Traffic Court

Traffic Court

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended
Traffic Court Rule 6.115(d)(1)		7-1-81 [401 So.2d 805]	10-11-90 [567 So.2d 1380]

Corresponding Statute Number: s. 322.293, F.S.

1. Is the rule inconsistent with the statute?	Yes.
2. How?	The rule requires that an assessment of $10 be made against every individual enrolling in a DUI course. The statute provides that $12 be assessed against each enrollee. In addition, the rule references a repealed statute, s. 25.387, F.S.
3. Has the statute been held unconstitutional?	No.
4. Does the rule expand rights beyond what has been required by court decisions?	No.
5. Was the rule created or amended in response to a court decision construing a substantive right?	No.
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	No.
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	No.
8. If the rule creates or modifies a substantive right, does it have a fiscal impact?	No.

Small Claims

Small Claims

Rule Review Completion Record

Subject Area: Small Claims

Rules Reviewed: Rule 7.010 – 7.230

Date Review Completed: October 5, 2005

Conclusion: Based on a completed review, no substantive modifications, expansions, or inconsistencies were found between the procedural rules and the current scope of corresponding substantive rights.

Certification of Court Reporters

Certification of Court Reporters

Rule Review Completion Record

Subject Area: Certification and Regulation of Court Reporters

Rules Reviewed: Nineteen rules were reviewed – 13.010 though 13.190, Rules of Judicial Administration.

Date Review Completed: November 28, 2005

Conclusion: These rules were adopted in 1998 by the court, but have been held in abeyance since that time until the program is funded by the Legislature.

Worker's Comp. Rules

Worker's Compensation Rules

Rule Review Completion Record

Subject Area: Worker's Compensation Rules

Rules Reviewed: (indicate the rule numbers for all rules reviewed): None reviewed

Date Review Completed: July 5, 2005

Conclusion: Based on a completed review, no substantive modifications, expansions, or inconsistencies were found between the procedural rules and the current scope of corresponding substantive rights.

Explanation: The entire Workers' Compensation Rules were inconsistent with statutory law prior to their repeal on December 2, 2004. The Supreme Court stated in the order repealing the rules that the court has never had the legal authority to promulgate the Workers' Compensation Rules. See *Amendments to the Florida Rules of Workers' Compensation Procedure*, 891 So.2d 474 (Fla. 2004).

Appendix

Appendix

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended

Corresponding Statute Number: _____

1. Is the rule inconsistent with the statute?	Yes or No
2. How?	(a. If the rule is not consistent with statute then describe the inconsistency and to what extent, if any, it impacts substantive rights differently than the statute. b. If the rule is not consistent with statute does the rule establish procedures that do not advance expressed or implied legislative intent.)
3. Has the statute been held unconstitutional? (by any district court of appeal, the Florida Supreme Court or any federal court?)	Yes or No, if yes cite the case. If the statute was amended subsequent to the court decision, explain the current status of the rule compared to the subsequent statute. If a rule was amended or created and an opinion adopting the rule justifies the rule's inconsistency to avoid "constitutional concerns" this answer should be "No"
4. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	Explain
5. Was the rule created or amended in response to a court decision construing a substantive right?	Yes or No (a) If yes, when was the case decided and when was the court rule created or amended? (b) If yes, did the court decision reflect a substantive change in law based on a new interpretation of a statutory or constitutional provision?
6. Does the rule create a procedural right that is broader or narrower in scope than the substantive right it is designed to enforce or implement?	Explain
7. Does the rule have the effect of creating a vested right not based in statute or the state and federal constitution?	Explain
8. If the rule creates or modifies a	Yes or No – Describe if fiscal impact is

substantive right, does it have a fiscal impact?	ascertainable or acknowledged by the Court.

Rule Number	Substantive Source	Date Originally Implemented	Date Last Amended

No Corresponding Statute

1. Does the rule create a new right not established in case law of the U.S. Supreme Court or Florida Supreme Court?	Yes or No (a) What, if any, is the constitutional source for the substantive right the rule is designed to enforce?
2. What new right is created?	Explain
3. Does the rule expand rights beyond what has been required by court decisions? (excluding court orders adopting rules)	Describe and explain whether the rule provides for stricter enforcement or greater protection than the constitutional minimum requires?
4. Was the rule created or amended in response to a court decision construing a substantive right?	Yes or No (a) If yes, when was the case decided and when was the court rule created or amended? (b) If yes, did the court decision reflect a substantive change in law based on a new interpretation of a statutory or constitutional provision?
5. If the rule creates or modifies a substantive right, does it have a fiscal impact?	Yes or No – Describe if fiscal impact is ascertainable or acknowledged by the Court.